IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1238 OF 2006

Ramsay D'Souza ... Petitioner

Vs.

Customs & Anr. ... Respondents

Mr. Subodh Markaneya, senior counsel with Mr. Raichandani and Niranjan Mundargi for the petitioner.

Mr. P.H. Kantharia, A.P.P. for the State.

CORAM : SMT. RANJANA DESAI, J.

DATED : 15TH DECEMBER, 2006.

P.C. :-

1. In this petition, the petitioner has challenged order dated 2/8/2003 passed by the Additional Chief Metropolitan Magistrate, 3rd Court, Esplanade, Mumbai in C.C. No.60/CW/2000 framing charges against him under sections 135(1)(i) of the Customs Act and order dated 21/3/2005 rejecting the application for discharge preferred by him.

2. The petitioner is working as Flight Purser with Air-India. He was intercepted by the A.I.U. Officers of Customs on 5/2/1999 and 14 gold

bars and other dutiable goods were seized from him. Subsequently, on 28/7/1999, adjudication proceedings were initiated against the petitioner. A show cause notice under section 124 of the Customs Act was issued to him. The Additional Commissioner, Customs, found the petitioner guilty and imposed a penalty on him. This order was confirmed by the Appellate Commissioner. The petitioner preferred a revision application against the said order. The Joint Secretary, Government of India remanded the matter to the Additional Commissioner. On remand, the Additional Commissioner reduced the penalty from Rs.5 lacs to Rs.3 lacs. However, he held the petitioner guilty. The petitioner preferred appeal against the adjudication order before the Commissioner (Appeals), who allowed the same and set aside the adjudication order. He exonerated the petitioner from all the charges. Respondent 1 - the Customs (A.I.U.), C.S.I. Airport, Mumbai, challenged the said order before the Joint Secretary, Government of India, who confirmed the order passed by the Commissioner (Appeals). According to the petitioner thereafter, the order of suspension came to be revoked and he was reinstated in service.

3. It appears that in the meanwhile, respondent 1 filed final report against the petitioner in the criminal court and the case was numbered as CC-60/CW/2000 and charges under sections 135(1)(a), 135(1)(b)

read with section 135(1)(i) of the Customs Act came to be framed against the petitioner. The petitioner preferred an application for discharge which came to be dismissed by the trial court. Being aggrieved by this order, the petitioner preferred revision application in the Sessions Court at Bombay. That application was allowed to be withdrawn. It is in these circumstances that the petitioner has approached this court.

4. I have heard, at some length, Mr. Markaneya, the learned senior counsel appearing for the petitioner. He submitted that it is not the case of the petitioner that he is being subjected to double jeopardy. He submitted that the objection of the petitioner is to the fact that the case of the Customs Department rests on the statement of the petitioner recorded under section 108 of the Customs Act which was subsequently retracted and the statements of the two pancha witnesses who have also turned hostile and the prosecution initiated against the petitioner also rests on the same material. The learned counsel submitted that since in the adjudication proceedings, the petitioner is exonerated, he can no longer be prosecuted. He submitted that the fact that the panchas have turned hostile; that the petitioner has retracted his statement and that the petitioner has disputed recovery of gold, ought to have taken into consideration by the court.

5. On the other hand, Ms. Kantharia, the learned A.P.P. relied on the judgment of the Supreme Court in ***Standard Chartered Bank & Ors. v. Directorate of Enforcement & Ors., (2006) 4 SCC 278*** and submitted that the adjudication proceedings and criminal prosecution are independent of each other and merely because the petitioner is exonerated in the adjudication proceedings, the prosecution cannot be quashed. The learned A.P.P. submitted that there is prima facie material against the petitioner and, hence, no interference is necessary with the impugned order. The learned A.P.P. has also taken me to the affidavit filed by Mr. J.S.P.L. Fernandes, Deputy Commissioner of Customs, A.I.U., C.S.I. Sahar, Mumbai.

6. In ***Standard Chartered Bank' case (supra)***, the contentions of the appellant was that since in the adjudication proceedings, no penalty was imposed and there was no finding of personal involvement of the appellant, the prosecution had also to be quashed. The Supreme Court referred to its earlier judgment in ***Santaram Paper Mills vs. C.C.E., (1998) 8 SCC 335.*** The Supreme Court reiterated its view that the adjudication proceedings and criminal prosecution are two independent proceedings. They are independent of each other and the finding on the adjudication is not conclusive on a prosecution under the Customs Act.

Therefore, even if the petitioner has been exonerated in the adjudication proceedings, that will not entitle him to an order of discharge. Besides, as pointed out by the learned A.P.P., apart from the statements of the pancha witnesses and the petitioner, there is evidence of two other officers of the Customs Department. The said evidence cannot be brushed aside, at this stage, as formal. It's value can only be assessed after the entire evidence before the learned Magistrate is examined. It is also pertinent to note that in the complaint filed by the Customs Department, about 10 witnesses have been cited. It is for the Customs Department either to examine them or not and this issue cannot be pre-judged at this stage. Viewed in the light of the judgment of the Supreme Court in ***Standard Chartered Bank's case (supra)*** and the fact that there is evidence apart from the one which has been considered by the adjudicating authorities, in my opinion, there is no substance in the petition. Petition is, therefore, rejected.

[SMT. RANJANA DESAI, J.]